

**MAY 27 2003****CATHY A. CATTERSON  
U.S. COURT OF APPEALS**

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Evergreen New Hope Health & Rehabilitation Center v. NLRB  
No. 02-71544

CANBY, Circuit Judge, dissenting:

The Regional Director properly applied the legal standard set forth by the Supreme Court in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001). There was evidence to support the view that the “charge nurses” were primarily involved in planning and administering medical care to the patients directly, and were involved only in sporadic and incidental ways in directing Certified Nurse Assistants who aided in some aspects of patient care. There was also evidence that discipline of the Assistants was determined and imposed by the Director of Nursing, not the charge nurses who sometimes recommended disciplinary action. Finally, the fact that the Director of Nursing was not present, but was “on call” during nights and weekends, does not make the charge nurses supervisors; instead it suggests that “the ultimate responsibility lies with the supervisory nurse, not the charge nurse.” Providence Alaska Medical Center v. NLRB, 121 F.3d 548, 555 (9th Cir. 1997).

The burden of showing that the charge nurses were supervisors lay with the

employer, Evergreen. Kentucky River, 532 U.S. at 711-12. The Regional Director's ruling that Evergreen had not carried that burden is a purely factual determination that was supported by substantial evidence. I would therefore deny Evergreen's petition and would order enforcement of the Board's order.